Supreme Court, U.S.
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NO. 93-23

In the Supreme Court of the United States

OCTOBER TERM, 1993

LINDA LESLIE MAXWELL,
Petitioner

versus

MONSANTO COMPANY AND RICK BROWN,
Respondents

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF MONSANTO COMPANY AND RICK BROWN IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether or not this Honorable Court should exercise its discretionary review under 28 USC §1254(1) to grant a writ of certiorari to review determinations of state law made by the United States Fifth Circuit Court of Appeals sitting in a diversity case.

PARTIES TO THE PROCEEDING

1. Linda Leslie Maxwell

2. Monsanto Company

3. Rick Brown

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OPINIONS BELOW AND JURISDICTIONAL STATEMENT

The opinions below and jurisdictional statement were presented correctly by the petitioner.

STATUTORY PROVISIONS INVOLVED

This case involves LSA-R.S.. 23:1061, as amended in 1989, effective 1990.

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OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The statement of the case presented by the petitioner is correct except insofar as it suggests that: (1) there are conflicting interpretations of LSA-R.S. 23:1061, as amended in 1989; and, (2) that the Fifth Circuit Court of Appeals

misinterpreted state jurisprudence concerning the personal liability of corporate executive officers. These matters are discussed in the argument section of this opposition.

SUMMARY OF ARGUMENT

Petitioner's application presents no special and important reasons for granting the writ of certiorari. None of the considerations found in Rule 10 of the Rules of the Supreme Court are present in this case. Petitioner's suggestion that there are conflicting interpretations of LSA-R.S. 23:1061 is incorrect. Finally, the United States District Court for the Eastern District of Louisiana and the United States Fifth Circuit Court of Appeals were correct in their interpretation of Louisiana state law governing executive officer liability.

ARGUMENT

THE CONSIDERATIONS FOUND IN RULE 10 OF THE RULES OF THE SUPREME COURT ARE NOT PRESENT IN THIS CASE

Rule 10 of the rules of the Supreme Court provides in part that:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctions such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of the United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

As can be seen from Petitioner's Questions Presented, none of the "character of reasons" found in Rule 10 are present in this case. The Questions Presented by the Petitioner ask this Court to review interpretations of state law made by the United States Fifth Circuit Court of Appeals in a diversity case. This court has stated with regard to review of state court determinations by a court of appeals that a "challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review." *Haring v. Prosise*, 462 US 306, 314 N. 8, 103 S.Ct. 2368, 2373 N. 8, 76 L.Ed. 2d 595.

PETITIONER'S SUGGESTION THAT THE LOUISIANA SUPREME COURT AND THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS HAVE CONFLICTING INTERPRETATIONS OF LSA R.S. 23:1061 IS INCORRECT

Petitioner argues that a writ should be granted because the United States Fifth Circuit Court of Appeals misinterpreted the amendment to LSA-R.S. 23:1061. The United States Court of Appeals for the Fifth Circuit interpreted the amendment to LSA-R.S. 23:1061 to mean that "the factors listed in the amendment cannot be used by themselves *or* in combination with other factors to defeat statutory employer status." *Salsbury v. Hood Industries*, 982 F.2d 912 (5th Cir. 1993). Because this amendment was only to be applied prospectively, the Fifth Circuit noted in *Salsbury* that it has not been applied by any Louisiana courts. The Fifth Circuit relied on statements from Louisiana appellate courts and concluded that the amendment overruled the *Berry* case, discussed at pages 4-5 of petitioner's writ application, and returned the statutory employer analysis to the "integaral relation" test found in *Thidobeaux v. Sun Oil*, 49 So.2d 852 (La. 1950). *Salsbury v. Hood Industries*, 982 F.2d at 915. It is this interpretation of the amendment that the Court of Appeals applied in the instant case. Petitioner suggests that this interpretation is contrary to an interpretation made by the Louisiana Supreme Court in *Bowens v. General Motors Corp.*, 608 So.2d 999 (La. 1992). Petitioner's argument is without merit.

Petitioner cites the following language from *Bowens* in support of her contention:

> This amendment apparently broadens the definition of statutory employers. However, given the facts of the present case, we believe the outcome would be the same under the amended statute as under the pre-amended statute.

Bowens v. General Motors Corp., 608 So.2d at 1001, note 4.

Petitioner then argues that:

> with that statement, the Supreme Court of Louisiana specifically refutes the Fifth Circuit's rejection of the *Berry* analysis. According to the Supreme Court, the amendment does not reject the *Berry* analysis, but instead incorporates that analysis into the wider customary practices test as developed by the Supreme Court, in *Reeves v. Louisiana and Arkansas Railway Co., et al*, 282 So.2d 503 (1973). No other interpretation would be commensurate (sic) with the Supreme Court's assessment that, "the outcome would be the same under the amended statute as under the pre-amendment statute." [Petitioner's application for writ pgs. 7-8]

It is hard to conceive how petitioner interprets the aforementioned language from *Bowens* to mean that the *Berry* factors are now incorporated into the broader analysis of statutory employment. *Bowens* was decided under the *Berry* factors and, as a result, the Louisiana Supreme Court was not faced with the meaning of the new amendment. Although the Louisiana Supreme Court recognized that the amendment "apparently *broadens* the

definition of statutory employers," 608 So.2d at 1001, n.4. (emphasis added) nowhere did the court state that the *Berry* factors are still to be considered. Further, this quote from *Bowens* only states that the *outcome* would be the same under the amended statute and the pre-amendment statute. The quote, then, only means that the result would be the same, i.e., that General Motors would be the statutory employer under either analysis. Given that the amendment broadened the definition of statutory employment, if a principal was found to be a statutory employer under the restrictive *Berry* analysis, then that principal would also be a statutory employer under the new broadened definition. Thus, contrary to petitioner's assertion, *Bowens* is in no way inconsistent with *Salsbury*.

Based on existing Louisiana jurisprudence, the United States Fifth Circuit Court of Appeals correctly interpreted and applied LSA-R.S. 23:1061 as amended in 1989. As such, petitioner's petition for writ of certiorari should be denied.

THE DISTRICT AND APPELLATE COURTS CORRECTLY APPLIED LOUISIANA LAW WITH RESPECT TO EXECUTIVE OFFICER LIABILITY

Petitioner also argues that the United States District Court for the Eastern District of Louisiana and the United States Fifth Circuit Court of Appeals misinterpreted and misapplied the law relative to executive officer liability found in *Canter v. Koehring Company,* 283 So.2d 716 (La. 1973) in finding fraudulent joinder of a Monsanto safety supervisor. Petitioner argues that nowhere in *Canter* or its progeny is it required that there be any personal con-

tact between the executive officer and the person injured. This argument ignores the express language of the Louisiana Supreme Court in *Esco v. Smith*, 468 So.2d 1169 (La. 1985). In *Esco* the Supreme Court stated:

> In order for a corporate officer to be held liable for purported personal fault or negligence which arises out of a breach of duty, that person must have some *personal contact* and *responsibility towards* the injured employee. *Raley v. Carter*, 401 So.2d 1006 (La. App. 1st Cir. 1981) (emphasis added).

468 So.2d at 1175.

Based on this language, the district court and the court of appeals were correct in requiring allegations of personal contact between Rick Brown and the petitioner in order for petitioner to state a claim against Rick Brown. Because there were no allegations of personal contact, the district court and court of appeals were correct in finding that Rick Brown was fraudulently joined. It is interesting to note that petitioner cites the *Esco* decision as holding a plant manager and his assistant liable to an injured plaintiff because their jobs included responsibility for plant safety. What petitioner fails to mention is that these two employees were held liable because they were on the jobsite and were responsible for day to day operations. *Esco vs. Smith*, 468 So.2d at 1176. Petitioner also fails to explain that two other supervisory employees in *Esco* were absolved from liability because they had delegated their duties to responsible subordinates, had seldom visited the jobsite *and* were unaware of the existence of the hazardous condi-

tion. *Esco v. Smith,* 468 So.2d at 1175. Similarly, in the instant case, Rick Brown was not alleged to be on the jobsite when petitioner was injured and was not alleged to have created the alleged hazardous condition.

CONCLUSION

Petitioner's petition for a writ of certiorari to this Court asks this Court to review decisions of a United States Court of Appeals interpreting state law in a diversity case. Respondents respectfully suggest that this is not the type of case that is worthy of review. With regard to the United States Fifth Circuit Court of Appeals interpretation of LSA-R.S. 23:1061, this interpretation is in line with those Louisiana state court decisions on the subject and was correctly applied in this case. The interpretation is not contrary to the decision of the Louisiana Supreme Court in *Bowens vs. General Motors Corp.*, as suggested by the petitioner. Finally, with regard to executive officer liability, the district court and court of appeals were correct in requiring either an allegation of personal contact between Rick Brown and petitioner, or an allegation of facts establishing a personal duty owed by Rick Brown to the petitioner in order to hold him liable. Petitioner's complaint lacked either allegation. As such, the district court and court of appeals were correct in finding that Rick Brown was fraudulently joined. Petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,
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